Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

ROSEMARY ANN KNIGHT,

Petitioner,

v.

DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE, DOD DECA (DEFENSE COMMISSARY AGENCY) AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit affirmed the district court's decision in a suit by Petitioner Rosemary Knight against her employer alleging sexual discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a) *et seq*.

Four questions are presented:

1. Does the failure by Respondent to properly characterize a comment by Petitioner, made defensively against the individual who sexually harassed her, negate an otherwise legitimate and non-discriminatory reason used to justify her termination?

2. Would such failure then relieve Petitioner from the burden of proving that the reason proffered by Respondent to justify her termination is not a true reason but instead serves as a direct evidence of retaliation?

3. Did the action by Respondent of terminating Petitioner after she cooperated in a sexual harassment investigation undermine the remedial and humanitarian purposes of Title VII?

4. Does the Fifth Circuit's opinion create a conflict regarding the scope of protected testimony under Title VII?

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Knight v. Rumsfeld*, 2004 WL 1854236 (5th Cir. (Tex.)). The Fifth Circuit affirmed the March 10, 2004 decision of the United States District Court for the Western District of Texas. *See* Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1331.

The Fifth Circuit's opinion was rendered on August 19, 2004. *See* Appendix A. The Fifth Circuit denied Petitioner's Petition for Rehearing on September 20, 2004. *See* Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 2000e-3(a).

Other unlawful employment practices.

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other

> training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

1. Petitioner Rosemary Ann Knight asserts in this case that she was terminated from her position with Respondent Department of Defense/Defense Commissary Agency (DeCA) based upon discrimination and retaliation under Title VII. Nine days after reporting that she was being sexually harassed by Alvis Cleveland, a co-worker, Petitioner was terminated from her position at the commissary at Randolph Air Force Base, Texas, where she worked as a temporary wage-grade Store Worker (WG-4).

On the night of January 18, 2001, Petitioner was sexually assaulted by Cleveland as she worked alone at the commissary. Petitioner decided against reporting the assault to her supervisor or anyone else at the commissary because she felt ashamed and humiliated about the ordeal and, quite simply, did not want to talk about it any further.

However, because Cleveland persisted in directing sexual comments and innuendo at her, on the evening of January 23, 2001, Petitioner resolved to report Cleveland's actions. Petitioner went to the office of Gayle McGrath, her

supervisor, to report the sexual harassment by Cleveland and indicated that she wanted to file a complaint against him. McGrath asked Petitioner if she would be willing to provide a written statement describing the sexual harassment which Petitioner agreed to do.

Petitioner did not mention the sexual assault to McGrath at the time she provided her written statement accusing Cleveland of harassment nor she did not discuss the sexual assault after she reported the harassment because of McGrath's retaliatory conduct towards her. McGrath failed to conduct a fact-finding investigation into the complaint of sexual harassment and failed to interview witnesses noted in McGrath's affidavit.

Ultimately, Petitioner was terminated on February 1, 2001—only nine days after filing her sexual harassment charge against Cleveland. The reason ostensibly given to Petitioner was that she had engaged in conduct unbecoming a federal employee. McGrath premised her decision to terminate Petitioner based on her belief that Petitioner violated Respondent's "zero tolerance" policy for sexual harassment by engaging in a conversation of a sexual nature. Petitioner denies any evidence suggesting or proving that she had engaged in sexually harassing behavior or banter.

In the written statement provided to McGrath on January 23, 2001, Petitioner described a confrontation with Cleveland. As Petitioner was conversing with a female co-worker, Cleveland approached and made the following comment: "I have a big water moccasin in my pants, and it wants to come out!" In response, Petitioner stated, "Then, show us dammit! If you want I'll get Gayle [McGrath]

or Mike [Dawsey], maybe they'll want to see." Cleveland's comment was part of a pattern of sexually harassing behavior against Petitioner which included unwelcome physical contact.

2. Petitioner filed her *pro se* Complaint on November 7, 2003. On January 9, 2004, Respondent filed its Interlocutory Motion to Dismiss, Or, In The Alternative, For Summary Judgment under Federal Rules of Civil Procedure, Rule 12(b)(6) and Rule 56(c) (the "Motion"). The district court entered its Order on March 10, 2004, granting Respondent's Motion for summary judgment.

3. Continuing as a *pro se* litigant, Petitioner filed her Notice of Appeal on March 17, 2004. The Fifth Circuit's decision was entered on August 19, 2004. Petitioner timely filed her Petition for Rehearing *En Banc*. On September 20, 2004, the Fifth Circuit denied the Petition for Rehearing *En Banc*. The Fifth Circuit denied Petitioner's Motion to Stay the Mandate on October 13, 2004.

REASONS FOR GRANTING THE PETITION

Whether Respondent's termination of Petitioner constitutes a illegitimate, discriminatory reason on its face thereby relieving Petitioner from the burden of having to establish pretext for retaliation is an important question in the jurisprudence of Title VII litigation. The Fifth Circuit relied upon Petitioner's written statement regarding inappropriate comments she allegedly made while reporting a co-worker for sexual harassment. Both the Fifth Circuit and the trial court failed to consider the clarification provided by Petitioner in her Complaint and erroneously assumed that Petitioner was justifiably terminated for violating

Respondent's "zero tolerance" policy. The consideration of Petitioner's clarification renders the "zero tolerance" policy inapplicable to the facts in this case because it establishes that Petitioner was not engaging in sexual banter with a co-worker but was defending herself against his unwanted sexual harassment.

Petitioner asserts that the fundamental purpose of Title VII to provide remedial and comprehensive response to the problem of employment discrimination will not be advanced by allowing adverse employment actions to be directed against employees who have engaged in protected activity as defined by the statute. To continue along this principle will ultimate defeat Title VII's remedial purpose.

Review by this Court is also necessary to determine whether any comments provided by Petitioner are protected under Title VII notwithstanding Respondent's "zero tolerance" policy.

I. REVIEW IS WARRANTED TO UPHOLD THE REMEDIAL AND HUMANITARIAN UNDERPINNINGS OF TITLE VII.

A. The Facts Underlying This Case Establish A *Prima Facie* Case Of Retaliation In Violation Of Title VII.

Title VII forbids employers from discriminating against an employee because she has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Title VII. In order to prove a *prima facie* case of retaliation the employee must show that

(1) she "opposed" or "participated" in an activity protected by Title VII; (2) she suffered an adverse employment action; and (3) a causal connection existed between the opposition or participation in the protected activity and the adverse employment action. *Haynes v. Penzoil Co.*, 207 F.3d 296, 299 (5th Cir. 2000). *Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001). Petitioner would underscore the "exceptionally broad protection" afforded by Title VII's inclusion of assistance and participation *in any manner*. *See Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 n.18 (5th Cir. 1969) (emphasis added).

In the case at bar, the record has already established the following sequence of events leading to Petitioner's termination:

- Petitioner was hired by Respondent as a temporary, wage-grade Store Worker on December 17, 2000, to work at Respondent's commissary on December 17, 2000.

- On the night of January 18, 2001, Petitioner was sexually assaulted by Alvis Cleveland, a coworker, at the commissary. Because she felt ashamed and humiliated, Petitioner did not report this incident to her supervisor.

- Much to Petitioner's chagrin, the harassment against her by Cleveland continued. Several days later, Cleveland directed unwelcome and inappropriate comments laced with sexual innuendo at her. As one example, Cleveland remarked "my water mocassin wants to come out of my pants." According to Petitioner, and as supported by other affidavit

testimony, the phrase "water mocassin" was Cleveland's none-too-subtle reference to his penis.

- On the evening of January 23, 2001, Petitioner reported Cleveland's sexual harassment to McGrath for the purpose of filing a complaint against Cleveland. McGrath directed Petitioner to provide a written statement to this effect which Petitioner completed that evening.

- According to her written statement, Cleveland told Petitioner, *inter alia*, several times that he had a large penis, that girls loved it, and that girls loved to receive oral sex from him. Notably, Petitioner indicated in this same written statement that she explicitly told Cleveland that she had no interest in him and to desist from further discussion on this topic. According to Petitioner, Cleveland, at one point, approached her and stated, "I'm gonna' make you mine," to which she replied, "What the hell makes you think that I want to have sex with you? You are crazy." Cleveland attempted to justify this harassment by replying, "You told me that you aren't happy at home" to which Petitioner emphatically and accurately retorted: "That doesn't mean that I'm interested in sex with you or anybody else."

- Also included in Petitioner's written statement was a description of an exchange wherein Cleveland approached Petitioner and told her, "My water moccasin wants to come out of my pants." At this point due to her own mounting frustration and anger, Petitioner defensively replied, "Then, show us dammit!" with the general intention of warning

Cleveland of her intent to report him to her supervisor. Petitioner indicated in her written report that she "knew [she] was wrong, but . . . [she] was so angry and tired of it all."

- Based upon this so-called admission in her written statement, Petitioner was terminated from her position on February 1, 2001, because she allegedly had engaged in "Conduct Unbecoming of a Federal Employee."

Respondent has already stipulated that Petitioner engaged in protected activity under Title VII when she complained to McGrath about Cleveland's sexual harassment.[1] To this extent, Petitioner has clearly satisfied the first element of a *prima facie* case for retaliation. More specifically, by reporting the activity to her supervisor and by providing a written statement outlining the sexual harassments directed against her by Cleveland, Petitioner effectively engaged in activity protected under the "participation clause" of Title VII. The "participation clause" has been interpreted to protect a broad spectrum of activity including announcing an intent to file a charge, cooperating in an investigation, filing a charge, submitting affidavits during an EEOC investigation, testifying as a witness in court, and refusing to participate on behalf of an employer in a proceeding. *See Dorantes v. Texas Tech University Health Sciences Center*, 2003 WL 21474255 (W.D. Tex. 2003). The action of providing a written statement in response to the request from her supervisor constituted Petitioner's clear and direct cooperation in the investigation initiated against Cleveland based upon her initial report of sexual harassment.

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1. See Defendant's Interlocutory Motion to Dismiss, Or, In the Alternative for Summary Judgment at 8.

With regards to the second element of a *prima facie* retaliation case, Petitioner suffered the requisite adverse employment action when she was terminated from her job on February 1, 2001. And finally, with regards to the third element, Petitioner was terminated from her position only nine days after she filed her complaint with her supervisor. A causal connection may be inferred when the adverse action shortly follows the protected activity. *See Hochstadt v. Worcester Foundation for Experimental Biology, Inc.*, 425 F. Supp. 318, 324 (D. Mass. 1976), *aff'd,* 545 F.2d 222 (1st Cir. 1976). The facts, once again, clearly establish a *prima facie* case of retaliation in violation of Title VII.

B. Defendant's Proffered Justification To Terminate Petitioner Was Neither Legitimate Nor Non-Discriminatory And Thus Serves As A Necessary Pretext For Retaliation In Violation Of Title VII.

Where the defendant provides a legitimate, non-discriminatory reason for the adverse action, the burden shifts to the plaintiff to show that the reason offered by the employer is not its true reason but, was instead, a pretext for discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 130, 142-43 (2000).

In the instant case, the record establishes that Petitioner was terminated because she allegedly engaged in conduct unbecoming a federal employee. More specifically, McGrath premised her decision to terminate both Petitioner and Cleveland based upon the written statement Petitioner provided on January 23, 2001. In pertinent part, Respondent focused on the following exchange: Cleveland approached Petitioner and told her, "My water moccasin wants to come out of my pants." In response, Petitioner replied, "Then, show

us dammit!" Because she indicated in the written report that she "knew [she] was wrong, but . . . [she] was so angry and tired of it all," Respondent erroneously presumed that Petitioner had willingly engaged in sexual banter in violation of pertinent policies and prohibitions barring such conduct. Nothing could be further from the truth.

Petitioner attempted to clarify the statement used as the basis of termination in her *pro se* Original Complaint. In response to remarks directed against her, Petitioner emphatically and in the presence of at least one other witness stated "Then, show us dammit! If you want, I'll get Gayle [McGrath] or Mike [Dawsey], maybe they'll want to see." McGrath interpreted this comment as proof of Petitioner's willing participation in a exchange of sexual repartee. But, as clarified in her Original Complaint, Petitioner "made a defensive comment to the individual who had been harassing me, and after he sexually assaulted me the night before." She continued: "My comment to Alvis [Cleveland] was not sexual harassment. My comment to him was defensive and not a violation of the Title VII standard." As such, the proffered legitimate, non-discriminatory reason offered by Respondent becomes illegitimate and discriminatory on its face; thereby, technically relieving Petitioner from the burden of proving that the reason offered by the employer is not its true reason but, was instead, a pretext for discrimination.

C. Because Respondent's Proffered Evidence Was Neither Legitimate Nor Non-Discriminatory, Petitioner's Termination Represents Direct Evidence Of Retaliation.

Under the circumstances of the instant case, the requirement to establish necessary pretext and the analytical framework involving shifting burdens of production would

be inapplicable. Respondent's assertion notwithstanding, Petitioner never admitted in her complaint that she had engaged in inappropriate sexual banter. Her comments to Cleveland, as explained above were defensive and were intended to hold Cleveland accountable for his harassment. But because the information obtained from Petitioner was secured as a consequence of the investigation initiated by McGrath, Petitioner's subsequent termination alone would represent direct evidence of retaliation. *See Ward v. AOL, Inc.*, (11th Cir. 2000) (terminating an employee after his deposition even though he admitted to engaging in activities that were contrary to company policy was direct evidence of retaliation).

D. Permitting Respondent To Terminate Petitioner After She Had Cooperated In A Sexual Harassment Investigation Undermines The Remedial And Humanitarian Purposes Of Title VII.

Title VII provides a remedial and comprehensive response to the problem of employment discrimination. *See, e.g., Sanchez v. Standard Brands*, 431 F.2d 455, 465 (5th Cir. 1970) ("[Title VII] was designed to protect a worker from becoming an industrial pariah . . .".]; *Antonopoulos v. Aerojet-General Corp.*, 295 F. Supp. 1390, 1395 (E. D. Cal. 1968) ("[Title VII] is a remedial [law], and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every 'i' and cross every 't' on their way to the courthouse."). Given that Title VII is "remedial legislation which must be construed liberally," the courts "should avoid

technical interpretations" which would defeat the statute's remedial purpose. *Philbin v. Gen. Elec. Capital Auto Lease*, 929 F.2d 321 (7th Cir. 1991).

After she reported Cleveland for sexual harassment, Petitioner indicated that she would cooperate in an investigation to determine the merits of her charge. Notably, any investigation regarding Cleveland's sexual harassment effectively came to a halt upon the receipt of written statements from Petitioner and Cleveland and upon McGrath's immediate decision to terminate. As previously noted, Petitioner represented herself as a *pro se* litigant through her appeal to the Fifth Circuit. Petitioner is not an attorney nor does she have any legal training or background. With the exception of the petition for writ of certiorari, Petitioner has represented herself through the entirety of these proceedings. Petitioner has stridently maintained the violative conduct of Respondent based on her retaliatory discharge.

During the lower court proceedings, Respondent emphasized Petitioner's failure to include in her January 23, 2001, written statement any mention of the fact that she was sexually assaulted by Cleveland prior to that date. And when she finally did report the harassments directed against her in the January 23, 2001, statement, the end result was the unequivocal termination of her position based exclusively on the fact that McGrath twisted Petitioner's "admission." A defensive comment—"Then, show us dammit!"—became sexual banter and thus just cause for termination based on conduct unbecoming a federal employee.

Such strict application of so-called policy runs contrary to the underlying purpose of Title VII. By reporting the series of sexual harassments by Cleveland, Petitioner should never have been placed in a predicament where she would literally

have to choose between either maintaining her job security and source of income by remaining quiet or reporting a violation of federal law at the risk of losing her job. Yet, that is precisely what occurred in the instant case. Furthermore, if we are to presume the continued validity of Title VII along with the notion that it continues to provide a substantive basis upon which to address the problem of employment discrimination in the workplace, such purpose will be truncated by affirming the decision of the lower courts in this case. Petitioners will either have to become savvy regarding the nuances of labor/employment law or will be forced to consult with attorneys prior to committing themselves to cooperating in any investigation for fear of losing their job. To continue along this principle will ultimately defeat Title VII's remedial purpose. *See Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986) (retaliation "is likely to cause irreparable harm to the public interest in enforcing the law by deterring others from filing charges.")

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT REGARDING THE SCOPE OF PROTECTED TESTIMONY UNDER TITLE VII.

A. Presuming, *In Arguendo*, That The Court Upholds The Determination Of A Legitimate, Non-Discriminatory Justification By Respondent, Petitioner Did Establish That "But For" The Discriminatory Purpose, She Would Not Have Been Terminated.

Established Fifth Circuit precedent advances the proposition that "in retaliation cases where the defendant has proffered a nondiscriminatory purpose for the adverse employment action the plaintiff has the burden of proving

that "but for" the discriminatory purpose he would not have been terminated. In the instant case, Petitioner filed the initial sexual harassment charge against Cleveland. By logical extension, "but for" her action of reporting the sexual harassment, Petitioner would never have been terminated. Notably, Petitioner had never been counseled for any misconduct *prior* to reporting the sexual harassment against her. Additionally, there was no misconduct *after* she reported the harassment from which Respondent could have articulated a "legitimate" non-discriminatory reason for her termination.

B. The Fifth Circuit's Opinion Creates A Conflict Regarding the Scope of Protected Testimony Under Title VII.

It is a truism that the contents of a Petitioner's charge are protected and cannot *legally* have been the basis for any adverse action against her. *See Glover v. South Carolina Law Enforcement Division,* 170 F.3d 411, 414 (4th Cir. 1999) (asserting that "all testimony in a Title VII proceeding is protected against punitive employer action"). In the case at bar, Respondent relied on Petitioner's own written statement which, contrary to Respondent's assertion, was not an admission of participation in sexual banter but a defensive response to continued harassments by Cleveland. Yet, Respondent took action against Petitioner for participating in this protected activity—cooperating in an investigation—and not for any alleged misconduct separate to her statement.

Nonetheless, in qualitatively similar circumstances, "admissions" in a statement are considered protected and privileged information. *See Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) (concluding that

an employee cannot be fired for anything written in an EEOC charge). At the very least, Respondent should have made a reasonable effort to ascertain the exact nature of Petitioner's so-called admission rather than presuming, as was done in this case, that her comments automatically implicated her in a round of sexual banter. As argued above, such presumption should automatically negate any basis upon which Respondent can premise its ability to proffer a legitimate, non-discriminatory purpose.

To this extent, the Fifth Circuit's opinion runs contrary to persuasive determinations from at least one other circuit. Petitioner would argue that in accordance with Title VII's specific text, an employer may not fire an employee because of testimony provided in a Title VII proceeding. As stated in the Fourth Circuit opinion in *Glover*.

> Congress has determined that some irrelevant and even provocative testimony must be immunized so that Title VII proceedings will not be chilled. A straightforward reading of the statute's unrestrictive language leads inexorably to the conclusion that all testimony in a Title VII proceeding is protected.

Glover at 414. In short, to deny Writ of Certiorari would cause irreparable harm to the public interest and to Petitioner in this cause.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 19, 2004

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-50272
Summary Calendar.

ROSEMARY ANN KNIGHT,

Plaintiff - Appellant,

versus

DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE, DOD DECA (DEFENSE COMMISSARY AGENCY) AGENCY,

Defendant - Appellee.

Appeal from the United States District Court
For the Western District of Texas
San Antonio Division
No. SA-03-CV-1114

Before JONES, BENAVIDES and CLEMENT, Circuit Judges.

Appendix A

PER CURIAM:*

Rosemary Knight, pro se, filed suit against her employer alleging sexual discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. The defendant filed a motion for summary judgment, which the district court ultimately granted. We affirm.

Knight was hired by the defendant, in December 2000, as a wage-grade store worker in the commissary at Randolph Air Force Base. She served under a temporary appointment subject to a one year probationary period, which allowed the defendant to terminate her at any time without the use of more stringent procedures. Defendant has a "zero tolerance" policy on sexual harassment.

According to Knight, another store worker, Alvis Cleveland, began making sexually explicit comments to her during work. The summary judgment evidence also shows that several other employees, who witnessed the exchanges between Knight and Cleveland, testified that Knight enjoyed the attention and flirted with Cleveland. On January 23, 2001, Knight informed her supervisor, Gayle McGrath, that Cleveland was sexually harassing her. In her written statement, however, Knight admitted that she, too, had "said things wrong" at times. McGrath also obtained a statement from Cleveland, who stated that he and Knight made the comments to each other but that "maybe he had done things that were wrong."

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

On January 24, 2001, McGrath forwarded both statements to the Personnel Department with a recommendation that both Knight and Cleveland be terminated due to their admissions of participating in conversations of a sexual nature. On February 1, 2001, termination papers for both Knight and Cleveland were forwarded to McGrath. The stated reason for termination was conduct unbecoming a federal employee. Knight was given her termination letter on February 1. However, because Cleveland was out sick from February 1 through February 7, he was not given his termination letter until February 8, 2001, when he returned to work.

Knight asserts that she was terminated because of her sex and in retaliation for her complaint of sexual harassment. The defendant argues that Knight was terminated because of the Department's "zero tolerance" policy in conjunction with her own admission of wrongdoing. The district court granted the defendant's motion for summary judgment.

We review the district court's grant of summary judgment de novo. *BP Oil Intern., Ltd. v. Empresa Estatal Petoleos de Ecuador*, 332 F.3d 333, 336 (5th Cir.2003). Summary judgment is only proper where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Additionally, all inferences from the record must be drawn in the light most favorable to the non-movant. *Matshusita Elec. Indus. Co. v. Zenith Radio Co.*, 475 U.S. 574, 587-88 (1986).

To establish a prima facie case of sex discrimination under Title VII, a plaintiff must show "(1) she was a member of a protected class, (2) she was qualified for the position she lost,

(3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated." *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir.1998). The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. Knight asserts that the district court employed the incorrect legal standard when evaluating her case. Specifically, Knight argues that she has direct evidence of retaliation, as evidenced by the fact that she was terminated after she filed her sexual harassment complaint. Knight's argument on this point is unavailing. McGrath's legitimate, nondiscriminatory reason for terminating Knight was that she admitted, in her statement, to wrongdoing. This is not direct evidence of discrimination. *Id.* In this case, Knight has failed to make a prima facie case of sex discrimination. She has produced no evidence that others similarly situated were treated more favorably. In fact, both Knight and Cleveland, a male, were terminated, evincing their equal treatment under the defendant's policy.[1]

Knight established a prima facie case of retaliation under Title VII. However, where the defendant offers a legitimate, nondiscriminatory reason for the adverse employment action, the burden shifts to the plaintiff to show that the reason offered is pretext for unlawful retaliation. *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir.2000). The defendant's summary judgment evidence shows that Knight was terminated for violating the department's "zero tolerance" policy. Indeed,

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1. Knight argues that Cleveland was treated more favorably because he was fired one week after Knight. This argument lacks merit. Both Knight's and Cleveland's termination papers were prepared on the same day. Cleveland did not receive his until one week after Knight because he was out sick until February 8, 2001.

Knight admitted in a written statement to McGrath that she made inappropriate comments of a sexual nature. Knight also asserts that the district court made improper credibility determinations regarding the defendant's witnesses. The record contradicts this assertion, as it shows that the court relied on Knight's own written statement.

Thus, the burden shifts to Knight to show that the defendant's reason is pretextual. Knight has offered no evidence other than her own bare assertions to show that the defendant's stated reason for her termination was pretextual. *See Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 860 (5th Cir.2004) (conclusory allegations and unsubstantiated assertions insufficient to create a genuine issue of material fact). The district court's grant of summary judgment in favor of the defendant is **AFFIRMED.**

AFFIRMED.

APPENDIX B — ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION DATED AND FILED MARCH 10, 2004

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-03-CA-1114-RF

ROSEMARY ANN KNIGHT

Plaintiff,

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, DOD,
DeCA (Defense Commissary Agency),

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the Motion for Summary Judgment of Defendant Donald Rumsfeld, DOD and Defense Commissary Agency ("DeCA") (Docket No. 5); Plaintiff's Response; Defendant's Reply, and Plaintiff's Sur-Reply. Having carefully reviewed all of the various submissions and the applicable law, the Court GRANTS the motion.

Appendix B

Background

In her complaint, Plaintiff, who is proceeding *pro se*, alleges a claim under Title VII for discrimination on the basis of sex stemming from her termination. Plaintiff claims she was terminated in retaliation for complaining about sexual harassment by a co-worker, Alvis Cleveland. Defendant claims Plaintiff was terminated for conduct unbecoming a federal employee because she admitted to participating in a conversation of a sexual nature with Cleveland. Defendant claims that it had reason to believe that both Plaintiff and Cleveland acted inappropriately and both were thus terminated.

Plaintiff was hired by Defendant as a temporary, wage grade Store Worker on December 17, 2000, to work in Defendant's commissary at Randolph Air Force Base, Texas. Plaintiff served under a temporary appointment subject to a one year probationary period, which enabled Defendant to terminate her at any time without the use of more stringent adverse action or procedures used with permanent employees. The parties dispute whether Plaintiff received training on sexual harassment and a copy of the Defendant's policy on sexual harassment.[1] Defendant has a "zero tolerance" policy on sexual harassment.

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1. Plaintiff denies receiving a copy of Defendant's sexual harassment policy at any time during her employment. Plaintiff states that she did not view the sexual harassment video because employees had to get to work because of an upcoming inspection. Pl's Response, at 4. Defendant's Exhibit 3 is Plaintiff's training records which indicate that Plaintiff did receive sexual harassment training.

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According to Plaintiff, Cleveland made a number of inappropriate remarks to her.[2] On one instance, Cleveland stated "my water moccasin wants to come out of my pants."[3] According to Plaintiff, Cleveland used the term "water moccasin" to refer to his penis.[4] Knight states that because she was frustrated and angry at that point, she replied, "Then, show us, damnit!"[5] Knight further states, "I knew I was wrong, but I knew that I had a witness and I was so angry and tired of it all."[6] One co-worker, Andermann, witnessed the comments made between Plaintiff and Cleveland concerning the "water moccasin." Andermann did not perceive Plaintiff to be upset or angry because Plaintiff had a smile on her face.[7] In addition, Defendant has produced statements from several of Plaintiffs coworkers stating that Plaintiff flirted with Cleveland and acted like she enjoyed the attention, rather than was offended by it.[8]

On January 23, 2001, Knight went to Supervisor McGrath's office and informed her that Cleveland was sexually harassing her. McGrath had Plaintiff draft a written statement. In the

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2. *See* Def's Mot. Summ. Jud, at 3-4.

3. Def's Mot. Summ. Jud, Exh, 12.

4. *Id.*

5. *Id.*

6. *Id.*

7. Def's Mot. Summ. Jud, Exh, 11.

8. Def's Mot. Summ. Jud, Exh, 9,10,11. .

statement, Plaintiff stated she might have "said things wrong" at times.[9] McGrath then called Cleveland into her office and informed him that allegations had been made about sexual harassment. Cleveland laughed and told her it was a joke between him and Plaintiff. Cleveland told McGrath that Plaintiff had made comments to him about her private life and his body. Cleveland wrote a statement saying he was sorry it happened, that it would not happen again and that "maybe he had done things that were wrong."[10]

Plaintiff states that the incident involving the water moccasin comment was not the source of Plaintiffs complaint of sexual harassment, but a sexual assault that occurred the night before. Plaintiff has cited to no place in the record in which Plaintiff informed Defendant of the alleged sexual assault. Furthermore, Plaintiff's written statement made at the time of the sexual harassment allegation discusses the water moccasin incident but does not mention any sexual assault the previous night.

Pursuant to Defendant's zero tolerance policy, because both employees admitted to some wrong doing in their statements, McGrath felt that no further investigation was necessary and that she had no choice but to terminate both Plaintiff and Cleveland. On January 24, 2001, McGrath forwarded the statements to the Personnel Department with a recommendation that both Plaintiff and Cleveland be terminated. The Personnel Management Specialist, Mary Kay Gallagher informed McGrath that both Plaintiff and Cleveland could be terminated because

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9. Def's Mot. Summ. Jud, Exh, 12.

10. Def's Mot. Summ. Jud, Exh, 13.

they admitted to participating in conversations of a sexual nature with each other. Termination papers were prepared by the personnel office and given to McGrath on February 1, 2001.

The parties dispute what occurred from the date Plaintiff complained of the sexual harassment until the date of the termination. Defendant states that on January 25th, 2001, Plaintiff complained to McGrath that Cleveland had dropped a pallet in the aisle in such a way that she could not get her merchandise off of it. It was determined that although the pallet was unusually positioned, it was accessible from all four sides. McGrath called both Cleveland and Plaintiff into her office and told them they needed to treat each other with respect, and "if they could not be around each other without sniping each other, they needed to be away from each other."[11] McGrath had both Plaintiff and Cleveland sign a record of counseling. Plaintiff states she did not communicate with Cleveland after she made the allegations of sexual harassment, and that McGrath made it appear that Plaintiff and Cleveland had been sniping at each other.

Plaintiff was given her termination letter on February 1, 2001.[12] Cleveland was out sick on February 1, 2001 but was given his termination letter the first day he returned, February 8, 2001.[13] The letters of termination charged both Cleveland and Plaintiff with Conduct Unbecoming Federal Employees.[14]

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11. Def's Mot. Summ. Jud., Exh. 6.

12. Def's Mot. Summ. Jud., Exh. 6, 15

13. Def's Mot. Summ. Jud., Exh. 6, 17.

14. Def's Mot. Summ. Jud., Exh. 15, 17.

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Discussion

A. Legal Standard

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law.[15] A court must be satisfied that no reasonable trier of fact could find for the nonmoving party or, in other words, "that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict in his favor."[16] The moving party bears the burden of establishing that there are no genuine issues of material fact.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim.[17] The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists.[18] The nonmovant may

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15. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

16. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir.1990) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

17. *See Celotex*, 477 U.S. at 325; *see also Lavespere*, 910 F.2d at 178.

18. *See Celotex*, 477 U.S. at 324.

not rest upon the pleadings, but must identify specific facts that establish a genuine issue exists for trial.[19] The Court, in turn, "must draw all reasonable inferences in favor of the nonmoving party, and . . . may not make credibility determinations or weigh the evidence."[20]

B. Grounds for Summary Judgment

I. Plaintiff Cannot Establish a Prima Facie Case of Sex Discrimination Under Title VII.

To establish a prima facie case of discrimination under Title VII, a plaintiff may prove her claim either through direct evidence, statistical proof, or the test established by the Supreme Court in *McDonnell-Douglas Corp. v. Green*.[21] The *McDonnell-Douglas* test requires the plaintiff to show: (1) she was a member of a protected class, (2) she was qualified for the position she lost, (3) she suffered an adverse employment action, and (4) that others similarly situated were more favorably treated.[22] The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason

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19. *See id.* at 325; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1996).

20. *Reeves v. Sanderson Plumbing Prods., Inc.* 530 U.S. 133, 150 (2000) (citations omitted).

21. 411 U.S. 792 (1973)

22. *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998).

for the employment action.[23] If the employer does so, however, the scheme of shifting burdens and presumptions simply drops out of the picture, and the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved that the defendant intentionally discriminated against her because of her sex.[24]

Defendant argues that Plaintiff cannot make a prima facie case of discrimination because Plaintiff cannot show that males who engaged in the same conduct as Plaintiff were not similarly terminated. Defendant claims that the evidence is clear that males who acted similarly to Plaintiff - engaged in sexual banter- were terminated, as evidenced by the termination of Cleveland. Defendant argues that both employees were treated the same under the Defendant's zero tolerance policy.

Plaintiff responds that there is evidence that Plaintiff was treated differently than Cleveland. Plaintiff states that she was counseled several times for sexual harassment, while Cleveland was not. First, the record shows that McGrath recommended both Plaintiff's and Cleveland's termination immediately after receiving their written statement.[25] Second, even if Plaintiff received counseling that Cleveland did not, the fact that Plaintiff received such counseling before termination does not indicate that Plaintiff was treated worse

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23. *Urbano*, 138 F.3d at 206.

24. *See Urbano*, 138 F.3d at 206 [internal quotations omitted] *citing*, *St. Mary's Horror Center v. Hicks*, 509 U.S. 502 (1993).

25. Def's Mot. Sunnn. Jud, Exh. 6.

than Cleveland. Third, Plaintiff later states she was not counseled prior to termination.[26]

Plaintiff also claims Cleveland was treated favorably because he was not terminated until one week after Plaintiff and collected sick leave. Cleveland was out sick the day the termination letters were written by the Personnel Department. Cleveland was terminated the first day he returned to work. Plaintiff has not shown that there is any other reason than the fact that Cleveland called in sick for why Cleveland was terminated one week later.

Plaintiff has not alleged any facts to support a claim that males similarly situated to Plaintiff were favorably treated. The record supports the finding that Defendant swiftly took the exact same action - termination- for any employee believed to have engaged in sexual banter. Furthermore, even if Plaintiff could make a prima facie case of discrimination, Plaintiff cannot show that Defendant's stated reason for terminating her is not legitimate. While the Court finds the Defendant's decision to terminate Plaintiff to be a very harsh decision, Plaintiff has not come forward with anything other than bare assertion to challenges Defendant's evidence - especially the affidavits of Plaintiff's coworkers- that Plaintiff engaged in sexual banter and thus violated Defendant's zero tolerance policy. Thus, there is no genuine issue of material fact in regards to Plaintiffs claim of discrimination.

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26. Pl's Response, at 8.

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II. Plaintiff Cannot Establish a Prima Facie Case of Retaliation Under Title VII.

To survive summary judgment in a Title VII retaliation case, the plaintiff must make a prima facie showing: (1) that the plaintiff engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action.[27] However, even if Plaintiff can make a prima facie case of discrimination, the Defendant can come forth with a legitimate reason for the adverse employment action. The burden then shifts to Plaintiff to show that the reason proffered by the Defendant is pretextual.[28]

Defendant concedes that because of the close temporal proximity between the protected activity and the termination, Plaintiff has made a prima facie case of retaliation.[29] Defendant states that Plaintiff has not shown that Defendant's stated reason for the termination - that Plaintiff admitted she engaged in inappropriate conduct - is pretextual. The Court agrees. Because, for the reasons stated above in the discrimination claim, Plaintiff has not come forth with any evidence other than bare assertion to support her claim that Defendant's stated reason for termination was not legitimate, there is no genuine issue of fact in regards to the retaliation claim.

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27. *Banks v. East Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir. 2003).

28. *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 143 (2000).

29. Def's Mot. Summ. Jud, at 8.

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For the reasons stated above, it is hereby ORDERED that Defendant's Motion for Summary Judgment be GRANTED.

It is also hereby ORDERED that all pending motions be denied as MOOT.

It is so **ORDERED**.

Signed this 10th day of March, 2004.

s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 20, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04-50272

ROSEMARY A. KNIGHT

Plaintiff - Appellant

v.

DONALD H. RUMSFELD, SECRETARY, DEPARTMENT OF DEFENSE, DOD, DECA (Defense Commissary Agency) Agency

Defendant - Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING EN BANC

(Opinion 8/19/04, 5 Cir., _____, _____ F.3d _____)

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

Appendix C

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

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ENTERED FOR THE COURT:

s/ Edith H. Jones
United States Circuit Judge